Tan Sri Dato' Dr Awang Had bin Salleh & Anor v Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–609 OF 2006
MOKHTAR SIDIN, MOHD GHAZALI AND ZULKEFLI JJCA
7 SEPTEMBER 2007

Agency — Rights of principal — Secret commission taken by agent — Whether commission amounted to bribe — Sale of shares by agent — Whether agent owe fiduciary duty to owner for secret commission received — Whether proof of corruptness or corrupt motive was necessary — Whether presumption that commission was given with intention to induce agent to act favourably to the payer and unfavourably to principal applied

Civil Procedure — Payment into court — Application for deposit of money into court pending appeal and suit — Allegation of secret bribe — Whether risk of dissipation of proceeds of shares and commission received — Whether plaintiff had genuine proprietary tracing claim in suits

Sometime in January 1994, the plaintiffs submitted a proposal for the Systematic and Standardized Medical Examination of Foreign workers in Malaysia to the Government of Malaysia and applied for the scheme to be operated by them ('the concession'). Subsequently, in April 1994, the plaintiffs entered into a memorandum of understanding with Yayasan Kobena Sdn Bhd ('KOBENA') and Koperasi Doktor Malaysia Bhd ('KDM') to form a consortium to pursue the application for the concession jointly. Towards the end of June 1994, the first defendant approached KDM and indicated that he was also interested in making an application to the Government for the concession. In the meantime, unknown to the plaintiffs and KDM, the first defendant also submitted a proposal on 17 August 1994 for the concession to be awarded to the ninth defendant, a company named Anjur Dinamik Sdn Bhd ('ADSB'), which date was two days prior to ADSB's incorporation. The parties subsequently agreed to pursue the application for the concession jointly. Thereafter, to give effort to the arrangements between the parties and to facilitate the award of the concession, the twentieth defendant, a company named Fomema Sdn Bhd ('FOMEMA') was incorporated with shareholding by ADSB and KDM. On or about 17 September 1997, the Government awarded the concession to FOMEMA. By Schedule 6 of the concession agreement, the first plaintiff, the first and second defendants were listed and declared as directors of ADSB.

Subsequently, through an announcement in the Star Newspaper of PANTAI SUPPORT's proposed purchase of ADSB, PUSB and HISB, the plaintiffs became aware of the involvement of PUSB and HISB in the concession. The plaintiffs claimed they discovered that the first defendant and third defendant ('Dr Jit') had from 2 October 1997 till the date of the announcement and thereafter seriously

mismanaged the affairs and business of ADSB and had secretly placed into effect and carried out a scheme whereby large sums of monies were siphoned out from ADSB without the knowledge and consent of the plaintiffs and retained by the first defendant by himself and/or through the other defendants and Dr Jit for his personal benefit and/or for their joint benefits. The first plaintiff, as director and shareholder of ADSB and FOMEMA, and the second plaintiff as a shareholder of ADSB, brought a suit with regards to various fraudulent acts, misrepresentations, breach of statutory duties and breach of fiduciary duties by the first and second defendants and Dr Jit as directors and shareholders of ADSB and FOMEMA committed during the period between October 1997 up to April 2002. By way of notice of motion dated 22 June 2006 ('the motion') filed in this court, the second plaintiff applied for, inter alia, an order that the first defendant, pending the disposal of this appeal and High Court Civil Suit No D2–22–1412 of 2003 or until such further or other order of this court, do within seven days of the grant of the order herein (a) deposit a sum of RM31,749,819.08 with the deputy registrar of the High Court; and (b) deposit a further sum of RM2,000,000 with the deputy registrar of the High Court.

The issue was whether an interim order should be granted prior to the disposal of the appeal proper to prevent prejudice to the claims of the parties. In moving this court, counsel for the second plaintiff pointed out that, part of the plaintiffs' claim that was relevant to the motion was that the first defendant, when acting as the second plaintiff's agent in negotiating the sale of the second plaintiff's shares in ADSB to PANTAI SUPPORT, as part of the sale of FOMEMA to the PANTAI group of companies, received a gratification or bribe which was kept secret from the second plaintiff. Counsel further pointed out that in his statement of defence, the first defendant did not deny this averment.

Held, allowing the second plaintiff's application:

(1) The first defendant was an agent of the second plaintiff in the sale of their shares to ADSB and therefore the first defendant would seem to owe a fiduciary duty to the second plaintiff to account for the shares and cash sum that he received in the transaction relating to sale of ASDB shares to PANTAI SUPPORT. The shares and the cash sum, if given as a commission or other inducement to the first defendant and if kept secret from the second plaintiff may be said to be a bribe in civil law. Proof of corruptness or corrupt motive is unnecessary in a civil action and the court will not inquire into the donor's motive. Once the bribe is established (and this would have to be done at the trial) there is an irrebuttable presumption that it was given with an intention to induce the agent to act favourably to the payer, and therefore, unfavourably to the principal (see para 83).

(2) There was really a serious question to be tried and that the second plaintiff had shown that there was a risk that the first defendant may dissipate the proceeds of the shares and the cash sum before the disposal of the appeal proper if the orders applied for in the motion were not given. His conduct in disposing of the shares while the proceedings were ongoing in the High Court despite the direction of the trial judge that the status quo be maintained did not speak well of him. Furthermore the second plaintiff certainly had a genuine proprietary

tracing claim in the suits. As the second plaintiff had a proprietary claim of the proceeds of the shares and the cash sum which the first defendant had received, this interim order would serve the purpose of preserving that asset pending hearing of the appeal proper (see para 84).

(3) Having acted as an agent for the second plaintiff, the first defendant under the circumstances would seem to owe a fiduciary duty to the second plaintiff to account for the shares and the cash sum he received, it having something to do with the second plaintiffs sale of its shares in ADSB to PANTAI SUPPORT (see para 85).

[Bahasa Malaysia summary

Sekitar Januari 1994, plaintif-plaintif menghantar cadangan untuk Penstandardan dan Sistematik Pemeriksaan Perubatan Pekerja Asing di Malaysia kepada Kerajaan Malaysia dan memohon skim yang diuruskan oleh mereka ('konsesi'). Selanjutnya, pada April 1994, plaintif telah memasuki satu memorandum persefahaman dengan Yayasan Kobena Sdn Bhd ('KOBENA') dan Koperasi Doktor Malaysia Bhd ('KDM) untuk membentuk consortium bagi meneruskan permohonan untuk konsesi bersama-sama. Menjelang akhir Jun 1994, defendan pertama cuba mempengaruhi KDM dan menyatakan bahawa beliau juga berminat dalam membuat permohonan kepada Kerajaan untuk konsesi. Sementara itu, tanpa diketahui plaintif-plaintif dan KDM, defendan pertama juga menghantar satu cadangan pada 17 Ogos 1994 untuk konsesi gabi diawardkan kepada defendan kesembilan, sebuag syarikat yang bernama Anjur Dinamik Sdn Bhd ('ADSB'), yang mana tarikh adalah dua hari sebelum penubuhan ADSB. Pihak-pihak seterusnya bersetuju untuk meneruskan permohonan bagi konsesi bersama-sama. Kemudian, bagi memberikan hasil kepada penyusunan di antara pihak-pihak, sebuah syarikay bernama Fomema Sdn Bhd ('FOMEMA') telah ditubuhkan dengan pemegang saham oleh ADSB dan KDM. Pada atau kira-kira 17 September 1997, Kerajaan mengawardkan konsesi kepada FOMEMA. Menurut Jadual 6 perjanjian konsesi, plaintif pertama, defendan pertama dan kedua adalah tersenarai dan diisytiharkan sebagai pengarah-pengarah ADSB.

Kemudiannya, melalui satu pengumuman di dalam suratkhabar Star PANTAI SUPPORT bercadang membeli ADSB, PUSB dan HISB, plaintif-plaintif menyedari penglibatan PUSB dan HISB di dalam konsesi. Plaintif-plaintif menyatakan bahawa mereka mendapat tahu bahawa defendan pertama dan defendan ketiga ('Dr Jit') telah daripada 2 Oktober 1997 sehinggalah tarikh pengumuman dan selepas menyalah urus dengan serius urusan dan perniagaan ADSB dan telah secara rahsia melaksanakan dan menjalankan satu skim yang mana sejumlah besar wang telah mengalir keluar daripada ADSB tanpa pengetahuan dan kebenaran plaintif-plaintif dan disimpan oleh defendan pertama sendiri dan/atau melalui defendan-defendan lain dan Dr Jit untuk kegunaan persendiriannya dan/atau untuk kegunaan bersama mereka. Plaintif pertama sebagai pengarah dan pemegang saham ADSB dan FOMEMA, dan plaintif kedua adalah pemegang saham ADSB, telah membawa satu tindakan berkenaan dengan pelbagai tindakan penipuan, gambaran yang salah, kemungkiran tanggungjawab statutory dan kemungkiran tanggungjawab fidusiari oleh defendan pertama dan kedua dan Dr Jit sebagai pengarah dan pemegang saham ADSB dan FOMEMA yang dilakukan semasa tempoh di antara Oktober 1997

sehingga April 2002. Melalui notis usul bertarikh 22 Jun 2006 ('usul') telah difailkan di mahkamah ini, plaintif kedua memohon untuk, antara lain, perintah bahawa defendan pertama, sementara pelupusan rayuan ini dan Mahkamah Tinggi Tindakan Guaman No D2–22–1412 tahun 2003 atau sehingga selanjutnya atau perintah lain dari mahkamah ini, melakukan dalam tempoh tujuh hari daripada pengeluaran perintah ini (a) mendepositkan sejumlah RM31,749,819.08 kepada timbalan pendaftar Mahkamah Tinggi; dan (b) mendepositkan jumlah selanjutnya RM2,000,000 dengan timbalan pendaftar Mahkamah Tinggi.

Isu adalah sama ada perintah interim harus diberikan sebelum pelupusan rayuan sebenar untuk mencegah prejudis kepada tuntutan-tuntutan pihak-pihak. Dalam meneruskan mahkamah ini,peguam plaintif kedua menyatakan bahawa, sebagahian daripada tuntutan plaintif adalah releven kepada usul yang mana defendan pertama, semasa bertindak sebagai agen plaintif kedua dalam rundingan penjualan saham plaintif kedua di dalam ADSB kepada PANTAI SUPPORT, sebagai sebahagian daripada penjualan FOMEMA kepada kumpulan syarikat PANTAI, telah menerima suapan atau rasuah yang mana dirahsiakan daripada plaintif kedua. Peguam seterusnya menyatakan bahawa dalam pernyataan pembelaannya, defendan pertama tidak menafikan penegasan ini.

Diputuskan, membenarkan permohonan plaintif kedua:

(1) Defendan pertama adalah agen kepada plaintif kedua di dalam penjualan saham-saham mereka kepada ADSB dan oleh itu defendan pertama dilihat mempunyai tanggungjawab fidusiari kepada plaintif kedua untuk mengambil kira saham-saham dan jumlah tunai yang diterimanya dalam transaksi berkaitan dengan penjualan saham-saham ADSB kepada PANTAI SUPPORT. Saham-saham dan jumlah tunai, jika diberikan sebagai komisyen atau dorongan yang lain kepada defendan pertama dan jika dirahsiakan daripada plaintif kedua mungkin dikatakan sebagai rasuah dalam perundangan sivil. Bukti sogokan atau motif sogokan adalah tidak penting di dalam tindakan sivil dan mahkamah tidak akan bertanyakan motif penderma. Apabila rasuah telah dibuktikan (dan ini perlu dilakukan semasa perbicaraan) terdapatnya anggapan yang tidak dapat disangkal bahawa ianya telah diberikan dengan niat untuk mendorong agen untuk bertindak berpihak kepada pembayar, dan oleh itu tidak berpihak kepada principal (lihat perenggan 83).

(2) Terdapatnya persoalan yang sungguh serius untuk dibicarakan dan plaintif kedua telah menunjukkan bahawa terdapatnya risiko bahawa defendan pertama mungkin melesapkan hasil penjualan saham-saham dan jumlah tunai sebelum pelupusan rayuan sebenar jika perintah yang dipohon dalam usul tidak diberikan. Tindakannya dalam melupuskan saham-saham semasa tindakan sedang berlangsung di Mahkamah Tinggi walaupun arahan hakim bicara bahawa status quo dikekalkan tidak memberikan kesan kepadanya. Selanjutnya plaintif kedua sudah tentu mempunyai tuntutan mengesan tuan punya sebenar di dalam tindakan. Sebagai plaintif kedua mempunyai tuntutan tuan empunya kepada hasil penjualan saham-saham dan jumlah tunai yang

defendan pertama telah terima, perintah interim ini akan dapat digunakan untuk mengekalkan asset tersebut sementara pendengaran rayuan sebenar (lihat perenggan 84).

(3) Dengan bertindak sebagai seorang agen kepada plaintif kedua, defendan pertama di bawah keadaan yang kelihatan mempunyai tanggungjawab fidusiari kepada plaintif kedua untuk mengambil kira saham-saham dan sejumlah tunai yang diterimanya, ianya berkaitan dengan penjualan saham-saham plaintif kedua di dalam ADSB kepada PANTAI SUPPORT (lihat perenggan 85).]

Notes

For a case on secret commission taken by agent, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1150.

For cases on payment into court generally, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1254–1258.

Cases referred to

Anangel Atlas Compania Naviera SA and others v Ishikawajima-Harima Heavy Industries Co Ltd [1990] 1 Lloyds Rep 167 (refd)

Attorney General of Hong Kong v Reid and others [1994] 1 All ER 1 (refd)

Bristol and West Building Society v Mothew [1998] Ch 1 (refd)

Industries & General Mortgage Co v Lewis [1949] 2 All ER 573 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Regal (Hastings), Ltd v Gulliver & Ors [1942] 1 All ER 378 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 43, 44

Rules of the High Court 1980 O 29 r 2(3)

Appeal from: Suits No D2–22–1412 of 2003 and No D6–22–30 of 2003 (High Court, Kuala Lumpur)

Harpal Singh Grewal (K Kirubakaran, Joseph Yeo & Jasvinjit Singh with him) (AJ Ariffin Yeo Harpal) for the applicant/second plaintiff.

Raja Aziz Addruse (L Sabapathy, Tharminder Singh & S Bhuvaneswary with him) (Logan Sabapathy & Co) for the respondent/second defendant.

Mohd Ghazali JCA (delivering judgement of the court):

[1] There are two suits involved in these proceedings. The suits were consolidated and the trial is now ongoing in the High Court, and currently is still at the stage of the plaintiffs' evidence.

[2] The first plaintiff in the first suit, Guaman No D2–22–1412 of 2003 ('the D2 suit') is Tan Sri Dato' Awang Had Salleh and the second plaintiff is a company named Konsortium Bersatu Perkhidmatan Kesihatan Sdn Bhd. There are twenty defendants named in this suit and the first and second defendants are respectively Dato Dr

Mohamed Haniffa Abdullah and his wife, Datin Dr Selvarasi Veerappan @ Mumtaz Begum. The other defendants will be referred to in the course of this judgment.

[3] Tan Sri Dato' Awang Had Salleh and Konsortium Bersatu Perkhidmatan Kesihatan Sdn Bhd are also the plaintiffs in the second suit, Guaman No D6–22–30 of 2003 ('the D6 suit'). There are two defendants, namely, Dato' Dr Mohamed Haniffa Abdullah and Datin Dr Selvarasi Veerappan @ Mumtaz Begum.

[4] For ease of reference, we will refer to Tan Sri Dato' Awang Had Salleh and Konsortium Bersatu Perkhidmatan Kesihatan Sdn Bhd as the first and second plaintiffs respectively or the plaintiffs depending on the context and Dato' Dr Mohamed Haniffa Abdullah and Datin Dr Selvarasi Veerappan @ Mumtaz Begum as the first and second defendants respectively.

[5] In the course of trial in the court below, the plaintiffs filed an application by wayof summons-in-chambersdated 5 April 2006 (encl 263) wherein they applied for, inter alia, the following order, namely:

(i) That pursuant to O 29 r 2(3) Rules of the High Court 1980 and/or the inherent jurisdiction of this honourable court and/or paragraph 15 to the Schedule of the Courts of Judicature Act 1964, the first defendant, pending the disposal of these suits or until such further or other order of this honourable court, do within seven days of the grant of the order herein:

(a) deposit 16,000,000 shares in Pantai Holdings Berhad in a Central Depository Account to be maintained jointly by the plaintiffs' solicitors and the first defendant's solicitors or alternatively deposit a sum or RM34,880,000 being tne highest value the 16,000,000 Pantai Holdings Berhad shares obtained into an interest bearing account to be maintained jointly by the plaintiffs' solicitors and the first defendant's solicitors;

(b) deposit a sum of RM2,000,000 into an interest bearing account to be maintained jointly by the plaintiffs' solicitors and the first defendant's solicitors.

[6] Enclosure 263 was dismissed with costs by the trial judge, Zainun Ali J (as she then was) on 24 May 2006 and the plaintiffs have appealed against that decision. That appeal is pending before this court.

[7] On 13 June 2006, the plaintiffs filed in the court below an application (encl 271) praying for, inter alia, the following order, namely:

> That pursuant to s 43 of the Courts of Judicature Act 1964 and/or the inherent jurisdiction of this honourable court, pending the hearing and disposal of the appeal to the Court of Appeal against the dismissal of encl 263 or until such further or other order of this honourable court or the Court of Appeal, the first defendant, do within seven (7) days of the grant of the order herein deposit a sum of RM31,749,819.08 with the Deputy Registrar of this honourable court.

Enclosure 271 was dismissed by the trial judge on 12 July 2006.

[8] Meanwhile, by way of notice of motion dated 22 June 2006 (encl 7a) ('the motion') filed in this court, the second plaintiff applied for, inter alia, the following order, namely:

(i) Pursuant to s 44 of the Courts of Judicature Act 1964 and/or the inherent jurisdiction of this court, the respondent (ie, the first defendant), pending the disposal of this appeal and High Court Civil Suit No D2–22–1412 of 2003 or until such further or other order of this court, do within seven (7) days of the grant of the order herein:

(a) Deposit a sum of RM31,749,819.08 with the Deputy Registrar of the High Court;

(b) Deposit a further sum of RM2,000,000 with the Deputy Registrar of the High Court.

[9] When the motion came up for hearing before us on 18 July 2006, due to arguments on short service of the cause papers, we adjourned the hearing of the motion to 3 August 2006 and in the interim, ordered that the first defendant preserve an amount equivalent to 29.2% of the sum of RM31,749,819.08, ie, a sum of RM9,270,947.17 pending the disposal of the motion. We also directed that the first defendant inform solicitors for the second plaintiff the details of where the said sum of RM9,270,947.17 is preserved.

[10] The hearing of the motion was then adjourned to 10 August 2006. On 10 August 2006, after hearing the parties, we granted the orders prayed for by the second plaintiff.

[11] The first defendant has now filed an application in the Federal Court for leave to appeal and we have been requested to supply the grounds of our judgment. It would be appropriate to mention here that when the Motion came up for hearing before us, the trial judge has not supplied the parties her grounds of judgment for dismissing encl 263. We were further handicapped as we did not have sight of the minutes of proceedings in the court below.

[12] Order 29 r 2 of the Rules of the High Court 1980 ('Detention, preservation, etc of subject-matter of cause or matter') reads:

(1) On the application of any party to a cause or matter the court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under paragraph (1) to be carried out the court may by the order authorize any person to enter upon any immovable property in the possession of any party to the cause or matter.

(3) *Where the right of any party to a specific fund is in dispute in a cause or matter, the court may, on the application of a party to the cause or matter, order the fund to be paid into court or otherwise secured.*

(4) An order under this rule may be made on such terms, if any, as the court thinks just.

(5) An application for an order under this rule must be made by summons.

(6) Unless the court otherwise directs, an application by a defendant for such an order may not be made before he enters an appearance. (Emphasis added.)

[13] Section 43 of the Courts of Judicature Act 1964 ('applications') ('CJA') reads:

Wherever application may be made either to the High Court or to the court of Appeal, it shall be made in the first instance to the High Court.

[14] Section 44 of the CJA ('Incidental directions and interim order') reads:

(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the court.

[15] The plaintiffs' case, according to the pleadings, is as follows. Sometime in January 1994, the plaintiffs submitted a proposal for the Systematic and Standardized Medical Examination of Foreign workers in Malaysia to the Government of Malaysia and applied for the scheme to be operated by them ('the concession'). Subsequently, in April 1994, the plaintiffs entered into a memorandum of understanding with Yayasan Kobena Sdn Bhd ('KOBENA') and Koperasi Doctor Malaysia Berhad ('KDM') to form a consortium to pursue the application for the concession jointly.

[16] Towards the end of June 1994, the first defendant surfaced and approached KDM and indicated that he was also interested in making an application to the Government for the concession. He made the following representations to KDM:

(a) that he had put in place a detailed proposal for the concession to be awarded to him by the Government;

(b) that he represented several political personalities;

(c) that these personalities had been identified by the authorities charged with the duties of awarding the concession;

(d) that there were other persons or organizations which may have to be included in the concession on the directions of the Government;

(e) that the said political personalities had appointed him to pursue the application for the grant of the concession;

(f) that in the event these political personalities were denied participation, the plaintiffs' or KDM's submission would definitely be rejected by the Government;

(g) that the plaintiffs' or KDM's submission would be awarded to other parties interested in the Concession unless the plaintiffs and KDM cooperated with him;

(h) that he will monitor the negotiations;

(i) that the fifteenth defendant, a company named Masa Perunding Sdn Bhd ('MASA') will be the vehicle representing the political personalities; MASA is a company with an issued and paid-up capital of 5,000 shares of RM1 each;

(j) that MASA will reserve shares for allotment to the political personalities and other parties approved by the Government for participation in the concession.

[17] In the meantime, unknown to the plaintiffs and KDM, the first defendant also submitted a proposal on 17 August 1994 for the Concession to be awarded to the ninth defendant, a company named Anjur Dinamik Sdn Bhd ('ADSB'), which date was two days prior to ADSB's incorporation. The plaintiffs subsequently discovered that the first defendant's submission made through ADSB was an abridged version of the plaintiffs' submission.

[18] Due to the lucrative returns expected from the concession, the plaintiffs and KDM did not want their application for the concession to be jeopardized and thus after some meetings with the first defendant, all parties agreed to pursue the application for the concession jointly and seek legal advice on the best manner of obtaining the approval and participating in the concession.

[19] Acting on legal advice, the parties agreed that ADSB would be the vehicle to take up a 75% equity in the company to which the concession could be granted to and the remaining 25% could be taken up by KDM.

[20] The plaintiffs aver that at all material times, KDM, KOBENA, the first defendant and the Government of Malaysia recognized that the entire conception of and submission for the application for the concession was the intellectual brainchild of the plaintiffs and in view of the time and effort undertaken by the plaintiffs, the second plaintiff will be a majority shareholder of ADSB subject to any shares being required to be transferred to other organizations being approved by the Government including those persons or political personalties whom the first defendant claimed to be representing.

[21] To facilitate the appointment of directors and officers and as an interim measure, the shareholding of ADSB was structured in the following manner:

(a) 10% to the first plaintiff;

(b) 15% to the second plaintiff;

(c) 15% to KOBENA;

(d) 30% to the first defendant.

[22] It was further agreed that the balance of 30% of the shareholding of ADSB will be held by MASA and reserved specifically for the purpose of being allotted to

the persons and political personalities purportedly being represented by the first defendant and for the organizations which may be proposed by the Government to take up an interest in the concession provided always that in the event there was no such persons or political personalities or organizations approved by the Government, the balance of 30% shareholding of ADSB was to be allotted to the second plaintiff.

[23] Thereafter, to give effort to the arrangements referred to above and to facilitate the award of the concession, the twentieth defendant, a company named Fomema Sdn Bhd ('FOMEMA') was incorporated with the shareholding structure as follows:

Shareholder	Total No Of shares
ADSB	750,000
KDM	250,000

On or about 15 November 1996, the first plaintiff, Dato Zainal Ismail, Dr Jit Singh al Santok Singh, Jasvant Singh a/l B Kartar Singh (the third defendant and hereafter referred to as Dr Jit), Dr Fuad @ Fuad bin Ahmad and Jauhar Mohd Yassin were appointed directors of ADSB.

On or about 17 September 1997, the Government awarded the Concession to FOMEMA and a Concession Agreement was signed at a signing ceremony on the same day between the Government of Malaysia and FOMEMA. By Schedule 6 of the Concession Agreement, the first plaintiff, the first and second defendants, Dato Zainal Ismail, Dr Fuad @ Fuad bin Ahmad and Jauhar Mohd Yassin were listed and declared as directors of ADSB.

[25] The concession was implemented by FOMEMA with ADSB being solely responsible for organizing the provision of medical examinations envisaged to foreign workers and to supervise, control and assist in monitoring all activities related thereto and to collect the relevant fees and charges.

[26] ADSB was required to carry out inspectorate services and set up regional offices and also pay the doctors, laboratories and X-ray clinics within 10 days of receipt of payment advise from the information centre managed by KDM. KDM was charged with the obligation of organizing and setting up of an 'information centre' with a centralized database to collate and monitor all information relating to foreign workers and their medical and employment records which will be processed, preserved and be made available and accessible to ADSB and to any other parties so authorized to have access.

[27] The financial benefits to be enjoyed by the shareholders of ADSB in undertaking the supervision and monitoring services of the state of health of foreign workers were to be as follows:

(a) to distribute the service charge collected by FOMEMA at RM2 per foreign worker between ADSB and KDM;

(b) to share all profits retained by ADSB according to their shareholding after payment to all service providers and overheads of ADSB and deduction of such expenses as may be approved by the Board of Directors; and

(c) to pay the shareholders the aforesaid sums by way of dividends.

[28] The plaintiffs contend that the aforesaid arrangements were approved by the FOMEMA Board and also accepted and approved by the ADSB Board. The first defendant as managing director was entrusted with the task of preparing the formal documents. The first defendant informed the plaintiffs from time to time that the documents were being prepared but no documents evidencing certain sub-contracts were presented to them and it was only in December 1999 that the sub-contracts surfaced.

[29] ADSB and FOMEMA commenced operations in early December 1997 and the management of ADSB was placed under the control and direction of the first defendant who was appointed managing director while Dr Jit was appointed as medical director and later general manager in which capacity he assisted the first defendant in the day to day management of the affairs of ADSB and FOMEMA.

[30] The first defendant in his capacity as managing director of ADSB was expressly entrusted with the duty of ensuring that the implementation of the concession was carried out in accordance with the terms of the Concession Agreement and to ensure that there was a maximum return due to the several years of effort that the plaintiffs had put in.

[31] Subsequently the first defendant announced to the plaintiffs and KOBENA that the Economic Planning Unit and the Health Ministry and the Immigration Department had directed him as managing director of ADSB that 40% of ADSB's shareholdings has to be made available for allotment to various other parties including the parties whom he was representing and as a consequence thereof, the present shareholders of ADSB had to surrender part of their shareholding in ADSB to facilitate this proposal.

[32] Acting on the representations of the first defendant, a total of 1.75% of the plaintiffs' shareholdings and 1.05% of KOBENA's shareholdings in ADSB was transferred to MASA which consequently then held 62.8% of the shareholding of ADSB leaving the first plaintiff with 9.3%, the second plaintiff with 13.95% and KOBENA with 13.95%.

[33] The first defendant further represented that he will on his part reserve 4.2% of his shareholding in ADSB which was then held indirectly by him through MASA for the aforesaid purpose.

[34] The first plaintiff as chairman and director and the second plaintiff's representatives on the board of ADSB excluding Dr Jit, were not actively involved in the management of the affairs of ADSB save and except that from time to time they

attended Board meetings to be briefed by the first defendant as managing director on matters which required the attention of the board.

[35] Sometime in mid-1999, the first defendant informed the plaintiffs that he had identified a company known as Pantai Support Services Sdn Bhd ('PANTAI SUPPORT') as a party interested in purchasing the entire paid up capital of ADSB to which proposal the plaintiffs were receptive as they were eager to dispose their interest in ADSB and also put and obtain a monetary value to the shares in ADSB which were held by MASA for and on behalf of the plaintiffs. As it was then, ADSB had an issued and paid up capital of RM1,000,000 and its shareholding was structured as follows:

(a) the first plaintiff — 9.3%;

(b) the second plaintiff —19.9%;

(c) the first defendant — 30.8%;

(d) MASA — 40%.

[36] ADSB in turn was a 75% shareholder in FOMEMA and FOMEMA held and still holds the concession awarded by the Government of Malaysia to operate the Systematic and Standardized Medical Examination of Foreign workers in Malaysia.

[37] The first defendant refused the plaintiffs any participation in the negotiations for the sale of ADSB's shareholdings to PANTAI SUPPORT by representing to the plaintiffs that he was dealing with persons at the helm of Pantai Holdings Berhad, ie, the parent company of PANTAI SUPPORT. The plaintiffs on their part harboured reservations against the sale but nevertheless were interested in entering into any transaction which would be favourable and also put an end to their association with the first defendant and resolve the issue of MASA's shareholding in ADSB.

[38] On or about 28 February 2000, the plaintiffs executed an agreement with PANTAI SUPPORT for the sale of their shares in ADSB at a price of RM124,000,000 ('the said agreement'). The consideration for the sale of the ADSB shares was to be satisfied by the issuance of 37,920,489 new ordinary shares of RM1 each in Pantai Holdings Berhad at an issue price of RM3.27 per Pantai Holdings Berhad share.

[39] It was a further term of the said agreement that the shareholders of ADSB were entitled to the benefit of all profits, dividends and other payments due and outstanding as on 31 December 1999 which date was referred to as the 'Accounts Date' in the said agreement.

[40] Prior to the aforesaid sale, KOBENA intimated its desire to withdraw from its participation in the concession and the first defendant informed the plaintiffs that he had on his own accord transferred 8% of KOBENA's 13.95% shareholding in ADSB to MASA and the balance of 5.95% would be transferred to the second plaintiff and

A further indicated to the plaintiffs that the exercise of restructuring ADSB's shareholding would be an ongoing process and will be attended to by him from time to time.

[41] On 1 March 2000, ADSB's acquisition was announced in the Corporate B News Section of the Star Newspaper and upon reading the same and discussing the contents therein, the plaintiffs were 'deeply shocked and disturbed' with the purchasers, ie, PANTAI SUPPORT, which were proposing the following acquisitions apart from acquiring the entire issued and paid up capital of ADSB namely:

(a) 2 ordinary shares of RM1 each in a company called Pengkalan Usaha (M) Sdn C Bhd (the fourth defendant and hereafter referred to as 'PUSB') representing its entire issued and paid up share capital for a purchase consideration of RM92,000,000 to be satisfied by the issuance of 28,134,557 new ordinary shares of RM1 each in Pantai Holdings Berhad at an issue price of RM3.27 per Pantai Holdings Berhad share; and

D (b) Two ordinary shares of RM1 each in a company called Healthpac Industries Sdn Bhd (the sixth defendant and hereafter referred to as 'HISB') representing its entire issued and paid up share capital for a purchase consideration of RM88,000,000 to be satisfied by the issuance of 26,911,315 new ordinary shares of RM1 each in Pantai Holdings Berhad at an issue price of RM3.27 per Pantai Holdings Berhad share. E

[42] The plaintiffs, prior to the announcement in the Star Newspaper of PANTAI SUPPORT'S proposed purchase of ADSB, PUSB and HISB, did not have any knowledge whatsoever on the involvement of PUSB and HISB in the concession as at all material times ADSB and KDM were carrying out the services designated to F each of them under the terms of the concession.

[43] On further inquiry, the plaintiffs discovered that the first defendant and Dr Jit had from 2 October 1997 till the date of the aforesaid announcement and thereafter seriously mismanaged the affairs and business of ADSB and had secretly placed into G effect and carried out a scheme whereby large sums of monies were siphoned out from ADSB without the knowledge and consent of the plaintiffs and retained by the first defendant by himself and/or through PUSB, a company named Casa Damansara Sdn Bhd (the fifth defendant and hereafter referred to as 'CASA'), a company named Taiplus Trading Sdn Bhd (the seventh defendant and hereafter referred to as H 'TAIPLUS'), a company named Pujangga Ajaib Sdn Bhd (the eighth defendant and hereafter referred to as 'PUJANGGA'), the second defendant, Usha Rani a/p Govindasamy (the ninth defendant), Revathy a/p K Adakalam (the tenth defendant), Jeyamany a/p Palanivel (the eleventh defendant), Tan Kok Beng (the twelfth defendant), Chee Yuet Fang (the thirteenth defendant), Abdul Rahim Awang (the fourteenth defendant) and Dr Jit for his personal benefit and/or for their joint I benefits.

[44] Thus the first plaintiff, as director and shareholder of ADSB and FOMEMA, and the second plaintiff as a shareholder of ADSB, brought the D2 suit with regards to various fraudulent acts, misrepresentations, breach of statutory duties and breach

of fiduciary duties by the first and second defendants and Dr Jit as directors and shareholders of ADSB and FOMEMA committed during the period between October 1997 up to April 2002.

[45] The plaintiffs claim they only discovered the matters on which their claim herein is founded after they had entered into the said agreement to dispose all their interest in ADSB to PANTAI SUPPORT and upon obtaining documents, resolutions, bank statements and correspondence including documents submitted to the Securities Commission pertaining to the said sale.

[46] The plaintiffs also claim that the other defendants, except Yeo Tee Eong (the eighteenth defendant), FOMEMA and ADSB, aided and abetted and/or assisted the first and second defendants and Dr Jit in carrying out the aforesaid acts and had dishonestly assisted in the breach of fiduciary duties and were all participants in the fraud and had shared the proceeds from the fraud.

[47] The plaintiffs further contend that the first and second defendants and Dr Jit acted in breach of the memorandum and articles of association of ADSB and/or FOMEMA in their capacity as directors and Dr Jit also in his capacity as general manager and the first defendant as the managing director of ADSB.

[48] The plaintiffs have also discovered that there has been misappropriation of ADSB's funds and the plaintiffs have suffered phenomenal financial losses as a result of the misappropriation by the first defendant and Dr Jit assisted by the second defendant and several other defendants acting in breach of the trust reposed in them. The plaintiffs further complain that the defendants, except ADSB, FOMEMA and Yeo Tee Eong, had unjustly enriched themselves and had breached their duties as constructive trustees for them.

[49] The complaints made by the plaintiffs included the following:

(a) Unknown to them, the first defendant made unauthorized transfers of funds commencing 1 October 1997 from ADSB to PUSB; between 1 October 1997 and 31 December 1999 PUSB wrongfully retained or made a secret profit in the sum of RM31,647,155.40; the aforesaid transfers from the funds of ADSB to PUSB could only have been authorized by the first defendant and undertaken by him and Dr Jit who together with one Margaret Dass, an employee of ADSB, were signatories to cheques drawn in ADSB'S accounts and could effect the said transfers; further, the first defendant and Dr Jit were also signatories of PUSB's bank accounts.

(b) Between 1 October 1997 to 31 December 1999 TAILPLUS retained or made a secret profit of RM3,388,986.72 for the benefit of the first defendant and the ninth, tenth and eleventh defendants. Likewise, PUJANGGA made a secret profit of RM3,812,610.06 for the benefit of the first defendant and others associated with him and HISB retained or made a secret profit of RM423,623.34.

(c) Between 1 October 1997 and 31 December 1997 PUSB retained a sum amounting to RM3,812,616 for the benefit of the first defendant, the ninth and tenth defendants and/or Dr Jit and which were unauthorized benefits and/or secret profits made through a company named Clinipath Sdn Bhd.

(d) Between 1 October 1997 and 31 December 1999, PUJANGGA retained or made a secret profit for itself a sum of RM413,052 from charges imposed for X-ray services. Likewise, HISB by retaining a sum of RM1 for itself per worker, retained or made a secret profit for itself a sum of RM34,421 for itself.

(e) Between 1 October 1997 and 31 December 1999, the first defendant further made a secret profit of RM1,642,000 in the form of 'Consultancy Fees' purportedly provided by him to the aforesaid companies when in truth and fact he was at all material times a Director and Managing Director of ADSB and could not in law and fact act and in fact did not provide any such consultancy services.

[50] As a consequence of the above averments, the plaintiffs claim that the first and second defendants, Dr Jit, PUSB, the ninth, tenth and eleventh defendants, PUSB, HISB, TAILPLUS, PUJANGGA, the twelfth, thirteenth and fourteenth defendants either together with or through one or more of them made secret profits amounting to RM45,299,059.62.

[51] The plaintiffs further contend that the total sumtransferred from ADSB by the first defendant and Dr Jit to PUSB amounted to RM82,991,000 from the period 1 October 1997 to 31 December 1999.

[52] The plaintiffs contend that after the execution of the said agreement with PANTAI SUPPORT, they were denied any further dividends or profits as they were made to believe that their right to enjoy any other rights or privileges ended on the Accounts Date referred to in the said agreement and which was meant to be 31 December 1999. However, the first defendant and Dr Jit remained the managing director and general manager of ADSB and there were no changes in the directorship and shareholdings of PUSB, CASA, HISB, TAIPLUS and PUJANGGA.

[53] It was anticipated by the parties that the said agreement will be completed within six months from the date of its execution but due to various reasons, completion took place sometime in March or April, 2002. As PANTAI SUPPORT was dealing only with the first defendant as regards the completion of the said agreement, the first defendant informed the plaintiffs that an initial extension of six months was required for completion of the sale and thereafter there were several extensions extending the completion date to April, 2002.

[54] Unknown to the plaintiffs, the first defendant and Dr Jit continued with the wrongful transfer of funds from ADSB to PUSB for the benefit of the defendants from the period commencing 1 January 2000 to April 2002 and all of them are accountable to them for all sums of monies received and retained by them from ADSB for this period.

[55] Sometime in late March or early April 2002, the first defendant informed the plaintiffs that PANTAI SUPPORT had received the necessary approvals to transfer the Pantai Holdings Berhad shares to them in settlement of the purchase price of the sale of their shares in ADSB.

[56] On the suggestion of the first defendant, it was agreed that the total consideration payable by PANTAI SUPPORT to the shareholders of ADSB and PUSB be paid into the Central Depository System ('CDS') Account of a company named Alaf Kasih Sdn Bhd (the seventeenth defendant and hereafter referred to as 'ALAF') which exercise was carried out.

[57] During the same period, the first defendant informed the plaintiffs that he had identified certain parties who were interested in purchasing the Pantai Holdings Berhad shares and there were meetings between the second plaintiff's representatives, the first defendant and solicitors with a view towards finalizing the proposed sale.

[58] Subsequently, the first defendant entered into four sale and purchase agreements and informed the plaintiffs that he had received part payment of the purchase price of RM88,000,000 and after deduction of expenses, the first plaintiff was paid a sum of RM17,507,130.64 being part payment of the sale price of the shares to PANTAI SUPPORT.

[59] After the receipt of the RM88,000,000 and its distribution, serious disputes arose between the plaintiffs and the first defendant as regards the balance purchase price due to them which disputes led to them filing the D6 suit, the claim therein being confined only to the balance purchase price believed to be due to them but denied by the first defendant.

[60] After the filing of the D6 suit, the plaintiffs discovered that the first defendant had entered into yet another agreement to sell 23,379,000 Pantai Holdings Berhad shares held in ALAF's CDS Account to the eighteenth defendant and declared himself as their agent in undertaking the said sale. The plaintiffs contend that the said sale to the eighteenth defendant includes Pantai Holdings Berhad shares held in the ALAF's CDS account to which they have beneficial title and further contend they are beneficially entitled to the purchase price of RM42,000,000 due and payable by the eighteenth defendant.

[61] The plaintiffs contend that the first defendant at all material times acted as their agent in the negotiations with Pantai Holdings Berhad for the sale of their ADSB shares to PANTAI SUPPORT and that the first defendant acted in breach of his fiduciary duties to them in negotiating the sale of their shares in ADSB to PANTAI SUPPORT by negotiating part of the HISB purchase price of RM88,000,000 to be paid to himself without their knowledge.

[62] Further, when acting as their agent, the first defendant obtained promises of varying kinds from the purchaser of the ADSB's shares including those held by the plaintiffs that he will be rewarded for his efforts in helping the purchasers with the

injection of the concession into the Pantai group of companies terms workable for the purchasers. Consequently, in April, 2002, the first defendant received a sum of RM2,000,000 together with 16,000,000 Pantai Holdings Berhad shares valued at RM20,000,000 for having resolved the sale of the ADSB shares including those held by the plaintiffs to PANTAI SUPPORT.

[63] The plaintiffs contend that the aforesaid sum of RM2,000,000 was in truth and fact an illegal profit or commission received by the first defendant as their agent and they are entitled to recover the said illegal profit or commission from the first defendant.

[64] The plaintiffs aver that the following were monies received by the first defendant.

	PARTICULARS	AMOUNT (RM)
(a)	Sale Price declared by the first defendant to the plaintiffs	130,000,000
(b)	Sale price not declared	10,000,000
(c)	Commission described as 'something' by the first defendant -16,000,000 Pantai Holdings Berhad shares at a price of RM1.25 each held by MENTORIA	20,000,000
(d)	Cash received as further part of the above	2,000,000
(e)	Commission or kickbacks received from HISB	8,210,000
(f)	Purported dividends received by ninth and tenth defendants	10,850,000
(g)	Consultancy fees received by the first defendant for the period 1997 and 1998	971,000
(h)	Consultancy fees received by the first defendant during 1999	671,000
(i)	Monies diverted to CASA prior to the sale of ADSB	22,322,591
(j)	Loans advanced to Darul Kembara Sdn Bhd	18,000,000
(k)	Less amounts received by the plaintiffs	(25,696,000)
	Balance in the hands of the first defendant and/or the other defendants	197,328,591

[65] In the D2 suit the plaintiffs prayed for, inter alia, the following orders:

(i) a declaration that the plaintiffs were the originator of the Scheme for the Systematic Medical Examination of Foreign Workers in Malaysia;

(ii) a declaration that the plaintiffs were at all material times the beneficial owners of the 30% shares held by MASA in ADSB;

(iii) a declaration that the plaintiffs were at all material times the beneficial owners of the 1.75% shares held by MASA in ADSB;

(iv) a declaration that the first, second, ninth, eleventh, and sixteenth defendants are accountable to the plaintiffs for the purchase price received by them from

the sale of the ADSB shares held by MASA and are further accountable for all profits, benefits and dividends received by them on account of the said shares;

(v) an order for payment to them of all amounts found to be due and owing pursuant to the aforesaid declarations;

(vi) a declaration that the first and second defendants and Dr Jit as directors of ADSB were in breach of their fiduciary duties;

(vii) a declaration that the first and second defendants and Dr Jit are accountable for all profits made by them and an account of such profits and an order for payment of the sum found due thereon;

(viii) a declaration that PUSB, CASA, HISB, Taiplus, Pujangga and the ninth, tenth, eleventh, thirteenth and fourteenth defendants were participants and had dishonestly assisted in the breach of the fiduciary duties owed to the plaintiffs by the first and second defendants and Dr Jit;

(ix) a declaration that PUSB, CASA, HISB, Taiplus, Pujangga and the ninth, tenth, eleventh, twelfth, thirteenth and fourteenth defendants are accountable for all profits made by them and an account of such profits and an order for payment of the sum found due thereon;

(x) an order directing the first and second defendants, Dr Jit, PUSB, CASA, HISB, Taiplus, Pujangga and the ninth, tenth, eleventh, twelfth, thirteenth and fourteenth defendants to refund RM45,299,059.62;

(xi) an order that an account be taken of all monies transferred to CASA from ADSB and/or PUSB or from where so ever and for such orders as may be made on taking such account;

(xii) an order directing the first defendant to refund a sum of RM1,642,000 being Consultancy Fees;

(xiii) that an account be taken of the amount of RM82,991,000 and all such further or other sums transferred from ADSB from the period 1 October 1997 to 31 December 1999 and for such orders as may be made on taking the account;

(xiv) an order directing the eighteenth defendant to pay the sum of RM42,000,000 or such other amount as may be outstanding from the eighteenth defendant from the sale and purchase agreement with the first defendant to the plaintiffs towards account of such monies as may be due to them;

(xv) such further or other orders as regards the receipt of the purchase price by the first, ninth and tenth defendants on the sale of the two shares of PUSB for RM92,000,000;

(xvi) an inquiry into all the transactions undertaken by the first defendant and the benefits received thereunder with a consequential order that the first defendant repays the plaintiffs all such sums as this honourable court may find due and payable to them;

(xvii) general damages against all the defendants.

[66] In the D6 suit, the plaintiffs prays for, inter alia, the following orders:

(i) a declaration that the first and second defendants are constructive trustees for the plaintiffs in respect of all monies received by the first and second defendants from the sale of PUSB;

(ii) judgment against the first and second defendants in the sum of RM19,059,474.29;

(iii) that the first defendant refunds to the plaintiffs the sum of RM28,000,000;

(iv) an account and inquiry be taken on the bribes, secret profits, gratification or commissions received by the first defendant in the form of cash and/or shares received by the first defendant over and above the purchase price declared to the plaintiffs as regards the sale of the ADSB shares;

(v) an order directing the first and second defendants to pay the amounts found to be due to the plaintiffs after such accounts and inquiries being undertaken;

(vi) an order against the first and second defendants restraining them from further proceeding with the sale of the remaining Pantai Holdings Berhad shares as directors of ALAF or in whichsoever manner;

(vii) damages.

[67] In the second plaintiff's affidavit in support of the motion, the deponent, Jasvant Singh @ Jasvant Singh a/l Kartar Singh, a shareholder and director of the second plaintiff stated as follows:

(i) that the first defendant had received a secret profit in the form of 16,000,000 Pantai Holdings Berhad shares valued at that time at RM1.25 per share or RM20,000,000 and a further sum in cash amounting to RM2,000,000 (hereinafter referred to 'the said shares' and 'the said cash sum' respectively) for his efforts in helping the purchasers with the injection of the concession into the Pantai group of companies upon terms workable for the purchasers;

(ii) that the said shares were received and held by the first defendant through a company named Mentoria Sdn Bhd ('MENTORIA');

(iii) that in his statement of defence, the first defendant has not denied receiving the said cash sum or the purpose for which he received the same;

(iv) that by an application by way of summons-in-chambers dated 3 December 2003 ('the first application') the plaintiffs applied to the High Court to preserve the said shares and the said cash sum and after several adjournments, the application was finally fixed for hearing on 27 October 2004 together with three other applications;

(v) that the hearing of the first application was completed save and except that counsel for the defendants were in the midst of making clarifications; during this clarification, on suggestion by counsel for Dr Jit Singh (the third defendant) and echoed by counsel for the first defendant, the parties consented to the first application being held over to the end of the trial pending an early trial for the entire action;

(vi) that there was in the meantime an order of court, when the first application and related applications were called up before the trial judge on 9 February 2006, that the status quo be preserved and that there be no dissipation of assets;

(vii) that the trial however did not proceed in the speedy manner as envisaged by an early trial order; fearing dissipation, counsel for the plaintiffs requested for a hearing of the first application limited to certain prayers but the trial judge ordered that a fresh application be made;

(viii) that notwithstanding the pending application made vide the first application to preserve the said shares and the said cash sum and the order of court that there be no dissipation of assets and that the status quo be maintained, a search made on 3 April 2006 on Pantai Holdings Berhad shows that MENTORIA had disposed 5,850,000 Pantai Holding Berhad shares, thus reducing its shareholding in Pantai Holdings Berhad from 16,000,000 shares to 10,150,000 shares;

(ix) that the plaintiffs, in compliance with the directions of the trial judge on 6 December 2005, filed encl 263 on 5 April 2006 seeking to preserve the said shares and the said cash sum ('the second application');

(x) that the second application was objected to on various grounds particularly as to the second plaintiff's capacity to affirm the affidavit in support thereof on behalf of the first plaintiff as he had hitherto been withdrawn as a witness by reason of his failing mental capacity; the second plaintiff henceforth filed a fresh affidavit confining its averments solely on behalf of itself;

(xi) that the first defendant again never disputed receipt of the said cash sum nor the reasons for his receipt thereof in his affidavit in reply;

(xii) that after hearing the parties, the second application was fixed for decision on 24 May 2006 where the trial judge dismissed the same; the plaintiffs appealed;

(xiii) that on the return date of the second application on 26 April 2006, the first defendant's counsel confirmed in the chambers of the trial judge that all but 4,000,000 of the said shares were sold which only went to show that the first defendant had proceeded to dissipate the said shares notwithstanding the service of the second application on his solicitors which was effected on 5 April 2006;

(xiv) that at the eleventh hour, on the morning of the adjourned hearing of the second application, the first defendant filed and served on the plaintiffs' solicitors an affidavit confirming that by then the first defendant had sold all the balance of the said shares;

(xv) that the second plaintiff aver that the concession by its solicitors and the indulgence of the trial judge granting an early trial now appears to have been abused by the first defendant in view of the dissipation that had taken place;

(xvi) that the first defendant had admitted in an affidavit affirmed on 6 November 2003 that he received the said shares and the said cash sum through MENTORIA as a secret profit in undertaking the sale of the second plaintiff's shares in ADSB to the Pantai group of companies upon 'terms workable for

them'; that this was confirmed by at the trial when the following two letters were introduced in evidence, namely:

(a) a letter dated 3 September 2001 from HISB addressed to the first defendant which reads:

> Dato' Dr Haji Mohamed Haniffa,
>
> No 4 Jalan Bunga Ros,
>
> 41000 Klang Selangor Darul Ehsan.
>
> Dear Dato',
>
> Issuance of 16,500,000 new ordinary shares of RM1 each in Pantai Holdings Berhad (Company No. 11832-K)('PHB')
>
> We refer to the share sale agreement dated 28 February 2000 in relation to the sale of 100% of the issued and paid-up share capital of Healthpac Industries Sdn Bhd to Pantai Support Services Sdn Bhd ('SSA') pursuant to which we shall receive at completion in accordance with its terms ('completion'), new ordinary shares of RM1 each in PHB credited as fully paid-up ('New Shares') in satisfaction of the purchase proce of RM88,000,000.
>
> *In consideration of services rendered by you in relation in the acquisition by Pantai Support Services Sdn Bhd (Company No 321428–W) of the entire issued and paid-up share capitals of Anjur Dynamik Sdn Bhd (Company No 312291–X), Pengkalan Usaha (M) Sdn Bhd (Company No 432298–X) and Heathpac Industries Sdn Bhd (Company No 45112–A) pursuant to separate share sale agreements each dated 28 February, 2000, we hereby irrevocably and unconditionally undertake to cause and procure the issuance to you or your nominee(s) at Completion an aggregate of 16,500,000 New Shares ('Delivery Shares').*
>
> We shall do all acts and take all such steps as are necessary to effect the above, including but not limited to issuing such irrevocable instructions to PHB as are necessary for the issuance of the Delivery Shares directly to you or your nominee(s).
>
> To facilitate the aforesaid, we shall require you to provide us with your or your nominee(s) CDS Securities Account numbers prior to completion and would appreciate you doing or procuring this to be done promptly upon our request.
>
> Your sincerely,
>
> (Sign)
>
> Affendi bin Zahari
>
> (NRIC No 650426–07–5419)
>
> (Sign)
>
> Abdul Rahman bin Mohamed Hashim
>
> (NRIC No 570322–06–5291)
>
> (Emphasis ours)

(b) A letter dated 8 March 2002 from HISB to PANTAI SUPPORT for the attention of one Lim Poh Seng. It reads:

Dear Sirs,

SHARE SALE AGREEMENT DATED 28 FEBRUARY 2000 IN RESPECT OF HEALTHPAC INDUSTRIES SDN BHD BETWEEN THE VENDORS LISTED THEREIN AND PANTAI SUPPORT SERVICES SDN BHD ('THE SHARE SALE AGREEMENT')

We refer to the above and to your letter dated 3 September 2001.

Unless provided otherwise, all capitalised terms used herein shall have the same meaning as that provided for in the Share Sale Agreement.

As agreed in item 3 of the said letter, we hereby instruct you to issue and allot the New Shares to our nominee as follows:

	Details	Number of New Shares
i.	Mentoria Sdn Bhd (571014-V) No. 16, Lorong Jambu Mawar Off Telok Pulai 41000 Klang Selangor Darul Ehsan	16,000,000
ii.	Affendi bin Zahari	500,000
iii.	Abdul Rahman bin Mohamed Hashim (Under an Account Qualifier to be opened under Allied Avenue Assets Nominees (Tempatan) Sdn Bhd in due course)	10,411,315

The details of the CDS account will be given to you in due course. We hereby acknowledge and agree that upon the issue and allotment of the New Shares to the abovenamed Nominee and to us, the Purchase Price shall be deemed to be fully satisfied pursuant to the terms and conditions of the Share Sale Agreement.

Yours faithfully,

(Sign)

Affendi bin Zahari

(NRIC No 650426–07–5419)

(Sign)

Abdul Rahman bin Mohamed Hashim

(NRIC No 570322–06–5291)

(xvii) that the above documents were concealed by the first defendant despite assurances to this court through his counsel that there will be maximum pre-trial disclosure of documents; that the first defendant had also continuously refused to disclose any documents on the fate of the said shares and the said cash sum notwithstanding notices to produce and written requests made of his solicitors; that the first defendant's suppression of documents clearly evidences his intention to completely dissipate the said shares and the said cash sum and deprive the second plaintiff of any relief under the first and second applications or any relief that the second plaintiff may obtain in the suits;

(xviii) that the second plaintiff believes that the first defendant's conduct, even in the face or judicial proceedings and applications, is lacking in probity and by the disposal of the said shares, a substantial part of the second plaintiff's claim and lawful entitlement has been dissipated;

A (xix) that the first defendant was at all material times a director and the managing director of ADSB and single handediy negotiated the sale of ADSB's total shareholding which included the plaintiffs' shares; that the second plaintiff's major complaint has been that the first defendant failed to disclose to the second plaintiff the secret benefits he negotiated and received for himself as consideration of him successfully disposing the entire share capital of ADSB or what he states as 'terms workable' to the purchasers, ie, PANTAI SUPPORT;

(xx) that the second plaintif only discovered the full extent and nature of the first defendant's questionable dealings upon receiving, that too, in 'trickles', documents and evidence relating to the sale of ADSB's shareholding which documents and information the first defendant was compelled through court proceedings to disclose;

(xxi) that the second plaintiff has a good cause of action against the first defendant and have a propriety claim on the said shares and the said cash sum and the first defendant consequently is bound to preserve the said shares and the said cash sum pending the disposal of the second plaintiff's claim and application;

(xxii) that the second plaintiff believes that the first defendant is not entitled in law to receive the said shares and the said cash sum as the second plaintiff's agent and he ought to be, in the absence of any credible explanation, be disgorged of the whole proceeds thereof;

(xxiii) that although the gratification was in the form of shares and cash, the second plaintiff, having made their intentions clear through applications that they intend to seek preservation orders were content to leave matters in status quo as there were pending preservation and Mareva applications and also a consensual agreement for an early trial but the present successful attempts to dispose of the said shares for cash compels the second plaintiff to make this application and seek the relief prayed for;

(xxiv) that the motion and the second application in the High Court were in accordance with the due process provided by law in view of the changed circumstances, that is, the clear act of dissipation, which the first defendant himself in his affidavit herein recognizes.

[68] The motion was filed as a result of the dismissal by the trial judge on 24 May 2006 of encl 263, ie, the plaintiffs' application by way of summons-in-chambers made pursuant to O 29 r 2(3) of the Rules of the High Court 1980. The appeal in relation to the dismissal of encl 263 is pending hearing before this court.

[69] We had in the interim, on 18 July 2006, pending the hearing of the Motion ordered that the first defendant preserve an amount equivalent to 29.2% of the sum of RM31,749,819.08, ie a sum of RM9,270,947.17.

[70] At the hearing of the motion on 10 August 2006 we granted the orders prayed for by the second plaintiff. Prior to granting the orders prayed for, we reminded ourselves that we were only hearing the motion and not the appeal against the

dismissal by the trial judge of encl 263. We also reminded ourselves that the orders applied for in the motion was only an interim measure pending the disposal of the appeal proper by this court. We further reminded ourselves that the trial of the two suits is currently ongoing.

[71] The issue before us was whether an interim order should be granted prior to the disposal of the appeal proper to prevent prejudice to the claims of the parties. In moving this court, counsel for the second plaintiff pointed out that that part of the plaintiffs' claim that was relevant to the motion was that the first defendant, when acting as the second plaintiff's agent in negotiating the sale of the second plaintiff's shares in ADSB to PANTAI SUPPORT, as part of the sale of Fomema to the Pantai group of companies, received a gratification or bribe which was kept secret from the second plaintiff. Counsel further pointed out that in his statement of defence, the first defendant does not deny this averment. Further, in his various affidavits in reply, the first defendant has not denied the second plaintiff's averments which was supported by evidence that he received the said shares and the said cash sum as gratification. That being the position, counsel argued that in the absence of a reply, the first plaintiff's allegations are to be taken as accepted. He then referred to *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 where Gopal Sri Ram JCA in delivering the decision of this court said (at p 286):

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted:

[72] To further support his submission, counsel highlighted that in the first defendant's afidavit filed in an earlier interlocutory application before the High Court (pp 518–519 of encl 7b to the motion), the first defendant went further to positively admit that he received the said shares and the said cash sum and his reasons for receiving the same. The relevant part of the said first defendant's affidavit reads:

> 42. There is a need therefore to draw a necessary distinctions (sic) on the dealings had with HISB of the Laboratory Division and the Tongkah Placement Exercise which has nothing to do with the Confidential Placement Exercise:
>
> (a) on one part, there were the dealings had between HISB and Taiplus under the aforesaid management position which gave rise to a total gross sum of approximately RM8,210,000 as at November 2000 which does not take into account the rebates back and other essentially (sic) payments;
>
> (b) *on the other part, there was the promises of varying kinds made at the onset to me (repeated thereafter by the Tongkah Parties during the course of the Pantai Sale) that they will give me something for my efforts in helping them with the injection of the Fomema Concession into Pantai Group upon terms workable for them* (emphasis ours).

[73] Counsel for the second plaintiff argued that para 42(b) of that affidavit (highlighted above) denotes that the first defendant, on his own admission, took a bribe/gratification for helping other parties at the expense of the second plaintiff. He further argued that this bribe/gratification is further confirmed in the letter dated

3 September 2002 (reproduced earlier) which was received in evidence in the trial before the High Court, especially the following paragraph of that letter, which reads:

> *In consideration of services rendered by you in relation to the acquisition by (the Pantai Group) of the entire issued and paid up capital of Anjur Dinamik Sdn. Bhd... we hereby irrevocably and unconditionally undertake to cause and procure the issuance to you or your nominee(s) at completion (of the Sale and Purchase Agreements) an aggregate of 16,500,000 New Shares* (emphasis ours).

Counsel then clarified that the letter dated 8 March 2002 (reproduced earlier) received in evidence and marked in the trial showed that the amount of shares that the first defendant was to receive was amended to 16,000,000.

[74] The second plaintiff's application pursuant to O 29 r 2(3) of the Rules of the High Court 1980 for the preservation of the said shares and the said cash sum was dismissed by the trial judge. It is not disputed that the said shares which was earlier registered in the name of MENTORIA have now been disposed of by the first defendant. The second plaintiff is now moving this court for an order that the proceeds of the sale of the said shares, equivalent to RM31,749,819.08 and the said cash sum be deposited with the deputy registrar of the High Court, viz, to prevent its dissipation.

[75] In opposition to the motion, counsel for the first defendant argued there is no evidence to support the allegations of bribery, viz, there is no good arguable case. Further, there is no evidence of dissipation and that damages are an adequate remedy and in relation to this, the first defendant's ability to make good damages in not doubted or challenged.

[76] What we were concerned with when we heard the Motion was whether there was a need for an interim order to prevent prejudice to the second plaintiff's claims until the hearing of the appeal proper. The second plaintiff's averment was that when acting as their agent, the first defendant obtained promises of varying kinds from the purchaser of the ADSB's shares including those held by the plaintiffs that he will be rewarded for his efforts in helping the purchasers with the injection of the concession into the Pantai group of companies on terms workable for the purchasers. Consequently, in April, 2002, the first defendant received the said shares and said cash sum for having resolved the sale of the ADSB shares including those held by the second plaintiff to PANTAI SUPPORT. The second plaintiff contend that the said cash sum was an illegal profit or commission received by the first defendant as their agent and they are entitled to recover the said illegal profit or commission from the first defendant.

[77] Looking at what was before us, we would agree with the submission of counsel for the second plaintiff that the definition in civil law of a bribe/gratification is wide enough to apply to and describe the first defendant's receipt of the said shares and said cash sum. We were of course aware that we were not in a position at this stage to decide whether the first defendant did receive the said shares and the said cash sum

as a bribe/gratification. That is certainly for the trial judge to decide. What we can only do at this stage is to decide whether the interim order applied for would prevent prejudice to the second plaintiff's claim.

[78] In *Anangel Atlas Compania Naviera SA and others v Ishikawajima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyds Rep 167, which was referred to by counsel for the second plaintiff, the question as to what is a civil bribe/gratification was dealt with extensively by Legatt J. In that case, the plaintiffs were seeking to recover moneys paid by the defendants to one George Thomas Richardson Campbell, a distinguished naval architect on the ground that such payments has been made secretly while Mr Campbell has been acting for the plaintiffs in the negotiation of shipbuilding contracts with the defendants. The learned Judge said (at pp 170–171):

> Mr Hunt has no authority which directly supports his first submission. The best he can do is to take each of the cases in which the court has considered whether or not a payment to an agent is to be treated as a bribe or secret commission, and to attempt to show that the conclusion of the court, if not the reasoning, was consistent, or at least not inconsistent, with his submission. But it seems to me that the submission, as a submission, is deficient, because the notion of identifying a payment as being, ostensibly or not, a bribe or secret commission, begs the question. That question is: what is the essential nature of a bribe or secret commission? In *Hovenden and Sons v Millhoff,* [1900] 83 LT 41 at p 43 Lord Justice Romer said:
>
> > If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent — that is to say, without the knowledge and consent of the principal - then the gift is a bribe in the view of the law.
>
> To the like effect is the definition formulated by Mr Justice Slade in *Industries and General Mortgage Co Ltd v Lewis,* [1949] 2 All ER 573 at p 575:
>
> > ... For the purposes of the civil law a bribe means the payment of a secret commission which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.
>
> More succinctly, it may be said that a bribe consists in a commission or other inducement, which is given by a third party to an agent as such, and which is secret from his principal.

[79] In *Industries & General Mortgage Co v Lewis* [1949] 2 All ER 573, Slade J said (at pp 575–578):

> For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the

person whom he know to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.

I hold that proof of corruptness or corrupt motive is unnecessary in a civil action, and my authority is the decision of the Court of Appeal in Hovenden and *Sons v Millhoff*...

Romer LJ, in his judgment, said (83 LT 43):

> It may, therefore, be well to point out what is bribe in the eyes of the law. Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent — that is to say, without the knowledge and consent of the principal — then the gift is a bribe in the view of the law.

I emphasise the learned judge's words: 'If a gift be made to a confidential agent with the view of inducing the agent' because counsel for the plaintiffs rightly emphasised those words. Romer, LJ, proceeds (ibid):

> If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive.

In other words, the learned judge is saying that once the bribe is established, there is an irrebuttable presumption that it was given with an intention to induce the agent to act favourably to the payer and, thereafter, unfavourably to the principal. Romer, LJ, continues:

> Secondly, the court will presume in favour of the principal, and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable.

That means that the motive of the donor in making the payment to the agent or donee is conclusively proved against the person who makes the payment, and, secondly, it is conclusively proved against the person making the payment that the donee is affected and influenced by the payment. The lord justice goes on:

> Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe.

That is to say, it must be presumed that the price is loaded as against the purchaser at least by the amount of the bribe.

[80] Counsel for the second plaintiff then pointed out that the first defendant has admitted that he acted as the second plaintiff's agent. As an agent, he clearly owed

a fiduciary duty to the second plaintiff to account for the bribe/gratification he received. To support his submission, he referred to *Bristol and West Building Society v Mothew* [1998] Ch 1 where Millet LJ said (at p 18):

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977), p 2, he is not subject to the fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

[81] Counsel also referred to *Attorney General of Hong Kong v Reid and others* [1994] 1 All ER 1 where, in delivering the judgment of the Board, Lord Templeman said (at p 5):

> When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.

and at p 9 said:

> ... a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done. From these principles it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured. A fiduciary remains personally liable for the amount of the bribe if, in the event, the value of the property then recovered by the injured person proved to be less than that amount.

[82] We would summarise the position between the two plaintiffs and the first defendant to be as follows:

(i) that the first defendant was an agent of the second plaintiff in the sale of their shares to ADSB;

(ii) that the first defendant would seem to owe a fiduciary duty to the second plaintiff to account for the said shares and said cash sum that he received in the transaction relating to sale of ASDB shares to PANTAI SUPPORT;

(iii) that the said shares and the said cash sum, if given as a commission or other inducement to the first defendant and if kept secret from the second plaintiff may be said to be a bribe in civil law;

(iv) proof of corruptness or corrupt motive is unnecessary in a civil action;

(v) the court will not inquire into the donor's motive;

(vi) once the bribe is established (and this would have to be done at the trial) there is an irrebuttable presumption that it was given with an intention to induce the agent to act favourably to the payer, and therefore, unfavourably to the principal.

[83] Looking at the above as a whole, we came to the view that there is really a serious question to be tried and that the second plaintiff has shown that there was a risk that the first defendant may dissipate the proceeds of the said shares and the said cash sum before the disposal of the appeal proper if the orders applied for in the Motion were not given. His conduct in disposing of the said shares while the proceedings were ongoing in the High Court despite the direction of the trial judge that the status quo be maintained does not speak well of him. We were also of the view that the second plaintiff certainly has a genuine proprietary tracing claim in the suits. As the second plaintiff has a proprietary claim of the proceeds of the said shares and the said cash sum which the first defendant had received, this interim order would serve the purpose of preserving that asset pending hearing of the appeal proper. The moneys are clearly identifiable and the claims of breach of fiduciary duty against the first defendant and the tracing claim in relation to the moneys in the first defendant's possession are, in our view, genuine claims. The second plaintiff's claim is clearly of a proprietary nature.

[84] Having acted as an agent for the second plaintiff, the first defendant under the circumstances discussed above, would seem to owe a fiduciary duty to the second plaintiff to account for the said shares and the said cash sum he received, it having something to do with the second plaintiffs sale of its shares in ADSB to PANTAI SUPPORT. In *Regal (Hastings), Ltd v Gulliver & Ors* [1942] 1 All ER 378 at p 386, Lord Russel of Killowen said:

> My Lords, with all respect I think there is a misapprehension here. The rule or equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profits would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefitted by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

[85] At the hearing of the appeal proper, this court would be in a position to decide whether the trial judge was correct in making the decision that she did in relation to encl 263 when this court would have the benefit of reading her grounds of judgment. Pending the disposal of the appeal proper, the order that we made would be necessary to prevent prejudice to the claims of the second plaintiff.

[86] For the above reasons we granted the orders prayed for in the motion until the disposal of Civil Appeal No A–02–609 of 2006. We also ordered costs to be in the cause with liberty to apply.

Application allowed.

Reported by Loo Lai Mee